South East Asia Insurance Bhd v Nasir Ibrahim

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–196–91
ABDUL HAMID OMAR LP, GUNN CHIT TUAN AND EDGAR JOSEPH JR SCJJ
25 JUNE 1992

Civil Procedure *— Appeal — Order in chambers — Commencement of time for appeal — Whether appeal filed out of time — Rules of the Supreme Court 1980 r 56(a)*

Contract *— Consideration — Past consideration — Whether sufficient consideration — Consideration and promise substantially one transaction — Essence of consideration — Contracts Act 1950 s 2(d)*

This was an action on a contract of indemnity. The only question of substance raised in this appeal was whether the third party indemnity executed by the respondent was invalid on the ground of past consideration because the performance bond signed by the appellant was dated 9 August 1986 whereas the said indemnity was dated 19 December 1986. Before the appeal was heard, the respondent filed a notice of motion to strike out the appeal as the notice of appeal had been filed out of time. The learned High Court judge in this case had heard the appeal of the respondent against the decision of the senior assistant registrar who had dismissed the respondent's application to strike out the appellant's writ of summons and statement of claim. The learned judge had allowed the appeal in chambers on 8 April 1991 and had also refused an application for further arguments in open court. The certificate requiring no further arguments in open court dated 24 April 1991 was subsequently issued by the learned judge. It was argued that the appellant's notice of appeal dated 14 May 1991 was filed out of time as the priod of one month to file the notice commenced from the date when the learned judge stated that he would not require further arguments, that is on 8 April 1991.

Held, allowing the appellant's appeal and dismissing the respondent's application:

(1) In the case of an appeal from an order made in chambers, r 56(a) of the Rules of the Supreme Court 1980 provides that no appeal shall, except by leave of the full court, be brought after the expiration of one month from the date when such order was pronounced or after the issue of the certificate of no further arguments whichever is the later or when the appellant first had notice of it. In the present case the learned judge did not make an order on 8 April 1991 for the issue of a certificate requiring no further arguments and the certificate was issued only on 24 April 1991, when the appellant knew of the issue of the certificate. In any case even if the appellant was six days out of time in filing the appeal, the court, sitting as the full court, could and would grant leave for the appeal to be brought.

(2) The essence of consideration is that the promisee has taken upon itself some kind of burden or detriment. The detriment undertaken by the promisee, the appellant, which in this case is the giving of a guarantee to a third party at the request of the promisor, the respondent, is a past performance and should be sufficient consideration where there is a promise in consideration of some act previously done by the promisee at the request of the promisor. In deciding whether consideration is past, the court should not take a strictly chronological view. If the consideration and the promise are substantially one transaction, as in this case, it should not matter in what order they are given. In order words, consideration itself accommodates past consideration so long as the 'desire' requirement is specified, that is the guarantee was given at the request of the indemnifier. As it can be proved that there was consideration, it can also be proved that the third party indemnity was valid.

[Bahasa Malaysia summary

Ini adalah suatu tindakan mengenai kontrak tanggung rugi. Soal tunggal yang berisi yang ditimbulkan dalam rayuan ini ialah sama ada tanggung rugi pihak ketiga itu yang disempurnakan oleh penentang adalah tak sah atas alasan balasan lampau oleh kerana bon pelaksanaan yang ditandatangani oleh perayu bertarikh 9 Ogos 1986 sedangkan tanggung rugi itu bertarikh 19 Disember 1986. Sebelum rayuan itu didengar, penentang telah memfailkan suatu notis usul untuk membatalkan rayuan itu oleh kerana notis rayuan itu telah difailkan di luar masa yang ditetapkan. Hakim Mahkamah Tinggi yang arif di dalam kes ini telah mendengar rayuan penentang itu terhadap keputusan penolong kanan pendaftar yang telah menolak permohonan penentang untuk membatalkan writ saman dan pernyataan tuntutan perayu. Hakim yang arif di dalam kamar telah membenarkan rayuan itu pada 8 April 1991 dan beliau juga telah menolak permohonan untuk hujah selanjutnya di mahkamah terbuka. Perakuan tidak memerlukan hujah selanjutnya di mahkamah terbuka bertarikh 24 April 1991 telah kemudiannya dikeluarkan oleh hakim yang arif itu. Telah dihujahkan bahawa notis rayuan perayu bertarikh 14 Mei 1991 itu adalah difailkan di luar masa yang ditetapkan oleh kerana masa sebulan untuk memfailkan notis itu bermula dari tarikh hakim yang arif itu menyatakan bahawa beliau tidak memerlukan hujah selanjutnya, iaitu pada 8 April 1991.

Diputuskan, membenarkan rayuan perayu dan menolak permohonan penentang itu:

(1) Di dalam kes rayuan daripada suatu perintah yang dibuat dalam kamar, k 56(a) Kaedah-Kaedah Mahkamah Agung 1980 memperuntukkan bahawa tiada rayuan akan, melainkan dengan kebenaran mahkamah penuh anggota, dibawa selepas tamatnya tempoh sebulan daripada tarikh bila perintah seperti itu diumumkan atau

selepas pengeluaran perakuan tidak memerlukan hujah selanjutnya yang mana saja yang kemudian atau bila perayu pertama mendapat notis tentangnya. Di dalam kes ini hakim yang arif tidak membuat perintah pada 8 April 1991 untuk pengeluaran perakuan tidak memerlukan hujah selanjutnya dan perakuan itu hanya dikeluarkan pada 24 April 1991, apabila perayu mengetahui tentang pengeluaran perakuan itu. Walau bagaimanapun walaupun perayu telah lewat enam hari dalam memfailkan rayuan itu, mahkamah, mengadakan perbicaraan sebagai mahkamah penuh anggota, boleh dan akan memberi kebenaran untuk membawa rayuan itu.

(2) Intipati balasan adalah bahawa penerima janji telah mengambil ke atas dirinya semacam beban atau kemudaratan. Kemudaratan yang dipikul oleh penerima janji, iaitu perayu, yang di dalam kes ini adalah pemberian suatu jaminan kepada pihak ketiga atas permintaan penjanji, iaitu penentang, adalah pelaksanaan lampau dan patut menjadi balasan yang mencukupi di mana terdapat suatu janji atas pertimbangan suatu perbuatan yang dilaksanakan sebelum itu oleh penerima janji atas permintaan penjanji. Dalam menentukan sama ada balasan adalah lampau, mahkamah tidak sepatutnya mengambil semata-mata pandangan kronologi. Jika balasan dan janji itu adalah sebahagian besarnya satu transaksi, seperti di dalam kes ini, ia sepatutnya tidak menjadi hal dalam apa susunan mereka diberi. Dengan perkataan lain, balasan dengan sendirinya merangkumi balasan lampau selagi keperluan 'keinginan' ditentukan, iaitu jaminan itu telah diberi atas permintaan pemberi tanggung rugi. Oleh kerana boieh dibuktikan bahawa terdapat balasan di dalam kes ini, boleh juga dibuktikan bahawa tanggung rugi pihak ketiga itu adalah sah.]

Notes

For cases on appeal from order in chambers, see 2 *Mallal's Digest* (4th Ed) paras 407–409.

Cases referred to

1 *Mae Bina Sdn Bhd v Chee Kie Chong* [1991] 3 MLJ 322 (distd)
2 *Chew Soon Tat v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 241 (refd)
3 *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd* [1980] 1 MLJ 172 (refd)
4 *Ram Narain v Lt Col Hari Singh & Anor* AIR 1964 Rajasthan 76 (refd)
5 *Kali Charan v Abdul Rahman* AIR 1918 PC 226 (refd)
6 *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828; [1961] 2 All ER 294 (refd)
7 *Western Credit Ltd v Alberry* [1964] 2 All ER 938; [1964] 1 WLR 945 (refd)
8 *Way v Hearn* (1862) 11 CB (NS) 774; 142 ER 1000 (refd)
9 *Goldshede v Swan* (1847) 1 Exch 154; 154 ER 65 (refd)
10 *Mumford v Gething* (1859) 7 CB (NS) 305; 141 ER 834 (refd)

11 *Lampleigh v Braithwait* (1615) Hob 105; 80 ER 255 (refd) A
12 *Pao On v Lau Yiu Long* [1980] AC 614; [1979] 3 WLR 435; [1979] 3 All ER 65 (distd)

Legislation referred to
Contracts Act 1950 ss 2(d), 77, 79
Rules of the Supreme Court 1980 r 56(a) B

Appeal from: Civil Case No D1–22–2229–1989 (High Court, Kuala Lumpur)

Chandran G Nair (*N Pannirselvam* with him) (*Thevin Chandran Siva Wong & Jamal*) for the appellant. C
C Soosay Nathan (*Roseline Sheila Thomas* with him) (*Abu Zahar Azmel & Partners*) for the respondent.

Cur Adv Vult D

Gunn Chit Tuan SCJ (delivering the judgment of the court): Before we heard this appeal, one Nasir Ibrahim (hereinafter referred to as 'the respondent') had filed a notice of motion dated 4 May 1992, to move the court for an order that the appeal of South East Asia Insurance Bhd (hereinafter referred to as 'the appellant') to the Supreme Court, its notice E of appeal dated 14 May 1991, and the memorandum of appeal dated 24 June 1991, be all struck out and that the costs of the application and the costs of the appeal be awarded to the respondent. The application was supported by an affidavit of Christie Marie Soosay Nathan, his counsel, who stated that the appellant's appeal was against the decision of Shaik Daud J given on 8 April 1991, whereby the learned judge had in chambers F allowed an appeal by the respondent against the decision of the senior assistant registrar who had dismissed the respondent's application to strike out the appellant's writ of summons and statement of claim in proceedings known as Kuala Lumpur High Court Civil Suit No D1–22–2229–89.

After the learned judge had pronounced his decision in chambers on 8 G April 1991, an oral application for further arguments in open court was made by the counsel appearing for the appellant. That oral application for further arguments was not allowed as shown by the following two sentences of the relevant notes of proceedings recorded by the learned judge: 'Mahkamah: Rayuan dibenarkan dengan kos. Permohonan untuk membuat hujah lanjut di mahkamah terbuka tidak dibenarkan.' H

A certificate pursuant to O 56 r 2(2) of the Rules of the High Court 1980, requiring no further arguments in open court dated 24 April 1991, was thereafter issued by the learned judge. A notice of appeal was filed by the appellant on 14 May 1991. But in a letter dated 6 June 1991, the senior assistant registrar of the Supreme Court indicated, inter alia, that the said I notice of appeal had been filed out of time. Mr Nathan stated that the notice of appeal dated 14 May 1991, was filed out of time as the period of one month to file the said notice of appeal commenced from the date the appellant had notice that a certificate requiring no further arguments was to

be issued, that is from 8 April 1991, when the learned judge stated that he would not require further arguments.

Counsel referred us to our recent decision in *Mae Bina Sdn Bhd v Chee Kie Chong*[1] in which case we had expressed the view at p 323 that in the case of an appeal from an order made in chambers, r 56(a) of the Rules of the Supreme Court 1980 clearly provides that no appeal shall, except by leave of the full court, be brought after the expiration of one month from the date when such order was pronounced *or* after the issue of the certificate of no further arguments whichever is the later *or* when the appellant first had notice of it. In that case, the appellant through its counsel knew of the issue of the certificate when it was ordered by the judge on 29 January 1989. In this case, however, we noticed that the learned judge on 8 April 1991, merely stated that the application for further arguments in open court was not allowed. The difference is that the learned judge in the present case did not make an order on 8 April 1991 for the issue of a certificate requiring no further arguments and we are of the view that he could have changed his mind before actually ordering the issue of a certificate, which was in fact not issued until 24 April 1991 when the appellant knew of the issue of the certificate in this case. We therefore considered that our decision in the *Mae Bina Sdn Bhd*'s case[1] should be distinguished because of the different facts and should not be applied in this case. In any case, even if the appellant was six days out of time in filing its appeal, we, sitting as the full court, could and would grant leave for the appeal to be brought. We therefore dismissed the respondent's notice of motion without any costs.

In so far as this appeal itself was concerned, the only question of substance raised was whether the third party indemnity executed by the respondent himself was invalid on the ground of past consideration because the performance bond signed by the appellant was dated 9 August 1986 whereas the said indemnity was dated 19 December 1986. In allowing the appeal, the learned High Court judge in his grounds of judgment referred to the case of *Chew Soon Tat v Malaysia National Insurance Sdn Bhd*,[2] in which the former Federal Court decided, inter alia, that a guarantor would only be liable for debts or liabilities incurred after the date of the guarantee. Mr Chandran Nair, counsel for the appellant, submitted that the learned judge had erred in referring to that case because the issue in that case was whether the appellant therein had accepted and/or undertook liabilities prior to 3 April 1972 when he signed the letter of guarantee.

Counsel also pointed out that the learned judge had referred to the case of *Perbadanan Kemajuan Negeri Selangor v Public Bank Bhd*[3] wherein Mohamed Azmi J (as he then was), after referring to *Ram Narain v Lt Col Hari Singh & Anor*,[4] expressed the view at p 175 that 'a contract of guarantee executed afterwards without any consideration is void'. Counsel pointed out that in *Ram Narain*'s case,[4] the Indian court had referred to the Privy Council case of *Kali Charan v Abdul Rahman*.[5] In *Kali Charan*'s case,[5] a deed was entered into between the plaintiff and the first defendant on 14 January 1909, whereas the other defendants executed a surety bond on 27 February 1909. In their defence, the defendants contended that the surety bond executed by them was without consideration. But the Privy Council ruled at p 227 that 'There was ample consideration for the bond; anything

done, or any promise made for the benefit of the principal, may be a sufficient consideration to a surety for giving a guarantee.' Counsel therefore submitted that although the dates of both documents in this case differed, however consideration exists and it is not past consideration because it is clear that the third party indemnity dated 19 December 1986, though executed subsequent to the performance bond dated 9 August 1986, was executed pursuant to the performance bond. Therefore the indemnity by the respondent is valid, and the illustration (c) to s 80 of the Contracts Act 1950 referred to by the learned judge in his grounds of judgment is not relevant.

We found in the first place that the difference between a contract of indemnity and a contract of guarantee appears to have been overlooked. A contract of indemnity is defined in s 77 of our Contracts Act 1950 as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person'. A contract of guarantee, according to s 79 of the Contracts Act 1950 'is a contract to perform the promise, or discharge the liability, of a third person in case of his default'. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. In a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, as distinct from a contract of guarantee which is a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee (see *Yeoman Credit Ltd v Latter*[6]).

When we examined the copy of the instrument shown on p 30 of the record of appeal, we found the words 'Third Party Indemnity' appearing in the heading of the instrument, which is an indication of the intention of the parties to sign a contract of indemnity (see *Western Credit Ltd v Alberry*[7] at p 940 per Davies LJ). The instrument then reads as follows:

> In consideration of your having at my request given a guarantee to the Perdana Sdn Bhd (hereinafter called 'the contractor') for the sum of Malaysian ringgit $371,338.37 guaranteeing the performance of contract by the said contractor in respect of Contract No: ... dated ... executed between Syarikat Pembinaan Dan Perumahan Tabung Haji Sdn Bhd (hereinafter called 'the principal') and the said contractor involving the Project Perumahan Awam, Alor Malai 3 di atas Lot Nos 95, 96, 98, 187, 435, 436, 437, 456, 854, 855 dan sebahagian Lot 165, Mukim Alor Malai, Kota Setar, Kedah.
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> I, the undersigned, Nasir Ibrahim, hereby undertake to indemnify and hold you harmless against all claims, damages, loss or demands arising out of the said guarantee and the payment by you, if any, under the said guarantee pursuant to a demand made in writing by the principal shall be sufficient to establish my liability to you in that sum or sums as you may have paid to the bank aforesaid.
>
> I further declare and agree that this indemnity shall continue to remain in force and valid,
>
> (a) until your liability under the said guarantee shall cease
> (b) notwithstanding any agreement between yourselves, the principal and the said contractor extending the period of liability under the said guarantee.
>
> I also hereby declare and agree that this indemnity shall remain valid and binding as to past and future advances ...

Although it is often difficult to determine whether a given instrument is a guarantee or an indemnity, a relevant consideration is that an indemnifier, unlike a surety, is not discharged by the creditor giving time to the principal debtor (see *Way v Hearn*[8]). In this case, we noticed that the indemnity shall continue to remain in force notwithstanding any agreement to extend the period of liability of the party to be indemnified as a guarantor. We are therefore of the view that the said instrument in this case is a contract of indemnity and not a contract of guarantee so that s 80 of the Contracts Act 1950 and cases concerning consideration for a guarantee referred to by the learned judge need not be considered by us.

There remains, however, the question of consideration for the third party indemnity. In the absence of any argument on this by both counsel, we do not propose, for the purposes of this appeal, to examine fully the meaning of the expression 'consideration' in our Contracts Act 1950. We would, however, urge that in construing the 'consideration' in a contract of indemnity, a court should be flexible and attempt to give business sense and efficacy to the agreement (see *Goldshede v Swan*[9]). In the present case, there would have been an oral agreement following the request of the respondent to the appellant and the contract of indemnity merely reduced it to writing (see *Mumford v Gething*[10]). But the learned judge in his judgment has stated that:

> Saya tidak bersetuju dengan pendapat peguam bagi pihak plaintif yang mengatakan perkataan 'has done' dalam s 2(d) Akta Kontrak 1950 itu menunjukkan Akta kita memperakui balasan yang lalu.

We must therefore take a look at s 2(d) of the Contracts Act 1950 which reads as follows:

> when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

In the present case, both the learned judge and counsel have only considered the meaning of the words 'has done' in the above-quoted definition and we too, for the purpose of this appeal, would confine ourselves to those words specifically.

The use of the words 'has done or abstained from doing' shows that our Contracts Act 1950, recognizes the principle laid down in *Lampleigh v Braithwait.*[11] That case was explained by the Privy Council in their recent case of *Pao On v Lau Yiu Long*[12] at p 630 in which the plaintiffs as owners of the issued share capital of a private company agreed to sell their shares to the defendants who were the majority shareholders of a public company. No money had passed under the agreement but the price of the shares was to be satisfied by an issue to the plaintiffs of shares in the public company. So as not to depress the market for the public company's shares, the plaintiffs undertook at the defendants' request to retain 60% of the new shares for one year. Later the defendants gave the plaintiffs a guarantee promising to indemnify the plaintiffs against any fall in the value of those shares during the said period. Subsequently the share prices dropped and the plaintiffs sought to rely on the contract of indemnity. The defendants

alleged, inter alia, that there was no valid consideration. The Privy Council held, inter alia,

> that an act done before the giving of a promise could be valid consideration for that promise if the act had been done at the promisor's request, the parties had understood that the act was to be remunerated either by payment or conferment of a benefit and the payment or conferment of a benefit would have been enforceable had it been promised in advance; that since the written guarantee itself referred to the plaintiffs' antecedent promise not to sell the shares before 30 April 1974, it was not possible to treat the defendants' promise of an indemnity as independent of the plaintiffs' antecedent promise made at the defendants' request; and that, therefore, since the guarantee fixed the benefit on the faith of which the plaintiffs' antecedent promise had been given, it stated a valid consideration for the promise of indemnity.

In a judgment delivered by Lord Scarman, the Privy Council said that:

> Mr Neill's submission is based on *Lampleigh v Braithwait* (1615) Hobart 105. In that case the judges said, at p 106:
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> > 'First ... a meer voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.'
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> The modern statement of the law is in the judgment of Bowen LJ in *In re Casey's Patents* [1892] 1 Ch 104, 115–116; Bowen LJ said:
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> > 'Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that here for past services there is ample justification for the promise to give the third share.'
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> Conferring a benefit is, of course, an equivalent to payment: see *Chitty on Contracts* (24th Ed, 1977) vol 1, para 154.

We are aware that the *Pao On* case[12] originated in Hong Kong where, as far as we know, there is no statute similar to our Contracts Act 1950. In our case, we are of the view that the essence of consideration is that the promisee, that is the appellant, has taken upon itself some kind of burden or detriment, that is the giving of a guarantee for the purpose of the performance of a contract by a contractor called 'Perdana Sdn Bhd'. In other words, the promisee in this case, that is the appellant, to its detriment has undertaken a legal responsibility. Its performance, which constitutes a consideration, is positive in that the appellant, as promisee, has done something, that is the giving of a guarantee to Perdana Sdn Bhd at the request of the promisor, that is the respondent. The detriment undertaken by the promisee, the appellant, in this case is a past performance and should

be sufficient consideration where there is a promise in consideration of some act previously done by the promisee at the request of the promisor. In deciding whether consideration is past, the court should not take a strictly chronological view. If the consideration and the promise are substantially one transaction, as in this case, it should not matter in what order they are given. In other words, consideration itself accommodates past consideration so long as the 'desire' requirement is specified, that is the guarantee was given at the *request* of the indemnifier. As it can be proved that there was consideration, it can also be proved that the third party indemnity was valid.

For the reasons given, we would therefore allow the appeal with costs here and below, set aside the order of the learned judge and restore the order of the senior assistant registrar dated 23 November 1990, dismissing the application of the respondent to strike out the appellant's writ of summons and statement of claim under O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980. The deposit is also to be returned to the appellant.

Appellant's appeal allowed; respondent's application dismissed.

Reported by Prof Ahmad Ibrahim